Supreme Court, U.S.
FILED
05-717 OCT 17 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

Thomas Saporito, Petitioner

v.

U.S. Department of Labor, et al.

On Petition For Writ Of Certiorari
To The Circuit Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas Saporito
pro se petitioner
National Environmental
Protection Center
11420 U.S. Highway One,#171
North Palm Beach, FL 33408
Telephone: 561-202-8797

QUESTIONS PRESENTED

(1) Whether the court of appeals erred in its July 21st, 2005, Order, denying Petitioner's motion for reconsideration of its June 2, 2005 Order including its ruling in No. 98-5631; and

(2) Whether the court of appeals erred in its June 2nd, 2005, Order, granting Intervenor's motion to dismiss Petitioner's appeal on res judicata grounds despite Petitioners incorporation seeking review of the court of appeals' ruling in No. 98-5631; and

(3) Whether the court of appeals erred in its August 3rd, 1999, Order in No. 98-5631, denying Petitioner's petition for review of the final decision and order of the United States Secretary of Labor and its refusal to reconsider its decision.

PARTIES TO THE PROCEEDING

Thomas Saporito
pro se Petitioner
11420 U.S. Highway One, #171
North Palm Beach, Florida 33408
Telephone: 561-202-8797

Howard M. Radzely
Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue
Room N-2716
Washington, D.C. 20210
Telephone: 202-693-5555

Mitchell S. Ross
Ellen S. Malasky
Counsel for Intervenor
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408
Telephone: 561-691-7126

1. TABLE OF CONTENTS

	Page
Jurisdiction	5
Statutory provision involved	5-6
Statement	6-9
Reasons for Granting the Petition	9-22
Conclusion	22
Appendix	23-24

TABLE OF AUTHORITIES

Cases:

English v. General Elec. Co., 496 U.S. 72, 82 (1990) 6

Chevron U.S., 4., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 104 S. Ct. 2778 (1984)..... 10

Bechtel Construction Co. v. Sec'y of Labor, 50 F.3d 926, 931, 933 (11th Cir.1995)..... 10

Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct.1420, 1427 (1971) (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938)..... 10

Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991)..... 10

Stone & Webster Eng'g Corp. v. Herman, 11 5 F.3d 1568, 1572 (11th Cir. 1977)..... 10

Cypress Trucking Lines, Inc., Case No. 88-STA-17, slip op. of SOL at 8 (Feb. 13, 1989)..... 16

Ertel v. Girous Bros. Transp., Inc., Case No. 88-STA-24, slip op. of SOL at 24-25 (Feb.16, 1986)..... 16

Priest v. Baldwin Assoc., Case No. 84-ERA -30, slip op. of SOL at 10 (June 11, 1986)..... 16

Price Waterhouse v. Hopkins, 490 U.S. 228, 252, 109 S. Ct.1775, 1791 (1989)..... 21
Ruud v. Westinghouse Hanford Co., ARB Nos. 99-023, 99-028, ALJ No. 1988-ERA-33, (ARB Apr. 18, 2002)..... 22

Statutes and regulations:
Act of Nov. 6, 1978, Pub. L. No. 95-601, 10, 92 Stat. 2951 (codified at 42 U.S.C. 5851(a) (1988) 5-6
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 7
Energy Policy Act of 1992, Pub. L. No. 102-486, 2902, 106 Stat. 2776, 3123 (codified at 42 U.S.C. 5851 6-7
Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.*: 42 U.S.C. 5851(a) (1988) (210(a)) 6-7
42 U.S.C. 5851(b)(1) (1988) 6-7
42 U.S.C. 5851(b)(2)(A) (1988) 6-7
42 U.S.C 5851(c)(1) (1988) 6-7
Fair Labor Standards Act, 29 U.S.C. 215(a)(3)
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)
10 C.F.R. 50.7(f)
29 C.F.R:
24.6(a) (1977) 7
24.6(b) (1977) 7
24.7 7
24.8 7
Miscellaneous:
61 Fed. Reg. 19, 978 (1996) 7
67 Fed. Reg. 64,272 (2002) 7

In the Supreme Court of the United States

THOMAS SAPORITO, PETITIONER

v.

U.S. DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner *pro se,* Thomas Saporito, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

JURISDICTION

The opinion of the court of appeals was entered lastly on July 21st, 2005. The petition for a writ of certiorari was filed on October 17th, 2005. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 210(a) of the Energy Reorganization Act of 1974 ("ERA"), added by Act of Nov. 6th, 1978, Pub. L. No. 95-601, 10, 92 Stat. 2951 (codified at 42 U.S.C. 5851(a)(1988)), provides that:

(a) No employer, including a [Nuclear Regulatory] Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or other wise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this [Act] or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this [Act] or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this [Act] or the Atomic Energy Act of 1954, as amended.[1]

STATEMENT

1. Section 210 of the Energy Reorganization Act or 1974 ("ERA") prohibits employers from discharging or otherwise discriminating against nuclear industry

[1] Section 210 was amended and renumbered Section 211, energy Policy Act of 1992, Pub. L. No. 102-486, 2902, 106 Stat. 3123 (codified at 42 U.S.C. 5851). Section 210 applies to this case because the complaints were filed in 1988.

whistleblowers, *i.e.*, employees who engage in specified forms of protected conduct relating to the advancement of nuclear safety. 42 U.S.C 5851(a)(1)(A)-(B). It thus "encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so." *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990).

Although most nuclear safety responsibilities are assigned by law to the Nuclear Regulatory Commission, "enforcement and implementation of [Section] 210 was entrusted by Congress * * * to the Department of Labor." *English*, 496 U.S. at 83 n.6. An employee who believes that he has been illegally discharged or otherwise discriminated against may file a complaint with the Secretary of Labor. 42 U.S.C. 5851(b)(1)(1988). The Department of Labor must investigate the allegation and notify the complainant and respondent of its initial determination as to whether a violation has occurred. 42 U.S.C 5851(b)(2)(A)(1988). A party dissatisfied with that determination may request a hearing before an administrative law judge ("ALJ"). 42 U.S.C. 5851(b)(2)(A)(1988). After the hearing, an ALJ issues a recommended decision and forwards it with the record to the Secretary, who issues a final order. 29 C.F.R. 24.6(a) and (b) (1997).[2] Any person adversely affected or aggrieved by the Secretary's final order may obtain judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1)(1988).

---

[2] The Department of Labor's Administrative Review Board ("ARB") was delegated authority to make final agency decisions for the Secretary pursuant to 29 C.F.R. 24.7 and 24.8; 61 Fed. Reg. 19,978 (1996), superseded by 67 Fed. Reg. 64,272 (2000).

2. In the fall of 1988, Florida Power & Light Company ("FPL"), a NRC licensee, fired petitioner after FPL had gained full knowledge that petitioner had communicated nuclear safety concerns to the NRC about operations at FPL's Turkey Point nuclear station which resulted in the NRC's Office of Investigation ("OI") to conduct an investigation of FPL for alleged "wrongdoing" brought by petitioner.

3. Petitioner filed two complaints[3] with the Department of Labor, alleging that FPL violated Section 210 of the ERA by retaliating against him and by ultimately firing him from his job at the Turkey Point nuclear station as an instrument and control technician. The Department's Wage and Hour Division investigated the complaints and concluded that FPL violated the ERA when it ultimately fired petitioner. After a hearing, the ALJ issued a recommended decision holding that petitioner had not engaged in protected activity with respect to the first complaint and that FPL did not violate the ERA in firing petitioner with respect to the second complaint.

On June 3, 1994, the Secretary issued a Decision and Remand Order agreeing with the ALJ with respect to the first complaint, but rejecting the ALJ's findings with respect to the second complaint in which the Secretary specifically found that FPL violated the ERA when it fired petitioner for refusing to divulge his safety concerns to FPL's site vice president John Odom. The June 3 decision stated that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." Decision and Remand Order (D. & R.O.) at 1. It also held that "[c]overed employers who

[3] The cases were docketed as 89-ERA-07 and 89-ERA-17 and consolidated by the ALJ at the first hearing.

discipline or discharge an employee for such [protected] conduct have violated the ERA," D. & R.O. at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." D. & R.O. at 6. After the conclusion of the second hearing, a different ALJ issued a Recommended Decision in favor of FPL. The ARB upheld the ALJ's Recommended Decision over petitioner's appeal.

4. The court of appeals denied petitioner's petition for review on August 3rd, 1999 holding that "The complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaints. We also conclude that Saporito has failed to demonstrate that proper legal standards were not applied." Order at 2.

5. On December 17th, 2004, following petitioner's petition for a new trial and his motion for reconsideration, the ARB issued a Final Decision and Order denying petitioner's motions.

6. On June 2nd, 2005, the court of appeals issued an Order granting Intervenor's FPL motion to dismiss on res judicata grounds.

7. On July 21st, 2005, the court of appeals issued an Order Denying petitioner's motion for reconsideration of the Court's June 2nd, 2005 decision.[4]

---

[4] Petitioner's petition for review by the court of appeals also incorporated a request that the Court reconsider its earlier decision made in this case and docketed as No. 98-5631, an unpublished decision. The court of appeals summarily denied all the issues raised by the *pro se* petitioner in its July 21, 2005 Decision docketed as No. 05-10449-DD.

REASONS FOR GRANTING THE PETITION

The court of appeals' refusal to reconsider its own decision in case No. 98-5631; and the court of appeals' granting of Intervenor's motion to dismiss on res judicata grounds conflicts with well-settled law which permits a court to reconsider its prior decisions.

1. This Court's review is warranted because the court of appeals improperly failed to reconsider its own decision in case No. 98-5631; and further, the court of appeals improperly applied the doctrine of *res judicata* in reaching its decision. First, the court of appeals has jurisdiction to review its own prior decisions under 11th Cir. R. 27-2. Here, the court of appeals is not subject to the doctrine of *res judicata* as it is free to reconsider its own decisions which have not been previously "touched" by this Court. Yet, the court of appeals, without comment, simply rejected *pro se* petitioner's motion for reconsideration of the court of appeals' decision in case No. 98-5631 and relied on the doctrine of *res judicata* in its judgment.

2. The court of appeals erred in failing to conduct a *de novo* review of the complaints raised in case No. 98-5631. Notably, the court of appeals held that:

> "The complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaint. We also conclude that Saporito has failed to demonstrate that proper legal standards were not applied."

Id. at 2.

However, on matters of law, the court of appeals is required to review *de novo* but also pay deference to the Secretary in construing the statutes he is charged with administering. *See Chevron U.S., 4., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

837, 104 S. Ct. 2778 (1984); *Bechtel Construction Co. v. Sec'y of Labor,* 50 F.3d 926, 931, 933 (11th Cir. 1995). Moreover, on matters of fact, the court of appeals reviews the Secretary's order for substantial evidence to support the decision. 5 U.S.C. 706(2)(E). The court of appeals must ask whether such relevant evidence exists "as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971) (*quoting Consolidated Edision Co. v. NLRB,* 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938). The court of appeals does not reweigh the evidence or substitute its judgment for that of the Secretary, but reviews the entire record to determine if the decision reached is reasonable and supported by substantial evidence. *Cornelius v. Sullivan,* 936 F.2d 1143, 1145 (11th Cir. 1991). Where the ALJ and the Secretary of Labor differ, as here, we have observed that , "[t]his disagreement causes us to review the Secretary's order more critically. Ultimately, however, the decision is the Secretary's. We ensure only that the Secretary's conclusion, if different from the ALJ's, is supported by articulate, cogent, and reliable analysis." *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1572 (11th Cir. 1997).

Here, in the instant action, the court of appeals failed to conduct a proper and *de novo* review of the Secretary's decision in Case Nos. 89-ERA-7 and 89-ERA-17 in determining if the decision reached was reasonable and supported by substantial evidence and by articulate, cogent, and reliable analysis.[5] The court

[5] The court of appeals erred by relying on an inaccurate record in reaching their decision in case No. 98-5631. Notably, the ALJ made a significant error at the first hearing by failing to create a true and accurate record of the proceeding over which he presided in accordance with 29 C.F.R. 18.59. The ALJ then complicated his error by allowing FPL to substitute portions of